APPENDIX

MONTGOMERY COUNTY COMMISSION ON HUMAN RELATIONS
PANEL ON PUBLIC ACCOMMODATIONS

CASE NO. P. A. 6

MR. AND MRS. MURRAY TILLMAN AND DR. AND MRS. HARRY CODY PRESS, *Complainants*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *Respondents*

Opinion, Including Findings of Fact, Conclusion of Law, Panel Decree and Final Order

On September 17, 1968, Mr. and Mrs. Murray Tillman instituted a complaint against the respondent, Wheaton-Haven Recreation Association, Inc., alleging violation of the County Public Accommodations Ordinance, Chap. 77, Sec. 77-9 and 10, Laws of Montgomery County (1968) (hereinafter referred to as the "Ordinance").

The basis of the complaint alleges that on July 24, 1968, Mrs. Grace Rosner, a Negro, was refused admittance to respondent's pool as a guest of the Tillmans, bona fide members of respondent. This refusal to admit Mrs. Rosner was allegedly based upon her lack of family relationship to a member despite the fact that she was admitted as a guest on July 19, 1968 and the family relationship criteria was not applied to Caucasian guests. The complaint also made reference to a long-standing policy of systematic racial discrimination and deprivation to some of respondent's members of their basic legal rights. These allegations were supported by accompanying affidavits, executed by several members of respondent.

On November 13, 1968, Dr. and Mrs. Harry Cody Press also instituted a complaint against the respondent, similarly alleging a violation of the Ordinance. The Press complaint

was based upon allegations that they were deprived of a membership application and subsequent admission to membership in May, 1968, solely on the ground that they are Negroes.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the Executive Secretary of the County Human Relations Commission, Bertram L. Keys, Jr., conducted an investigation of the facts and made a finding of probable cause to credit the allegations contained in the complaints. Mr. Keys also attempted unsuccessfully to conciliate the matter pursuant to the foregoing section of the Ordinance and has notified respondent that his office is still available for this purpose up to and including the present date.

The Commission's Panel on Public Accommodations ordered the complaints consolidated for a determination of the common issue involved and conducted a public hearing at 8:00 o'clock P.M., April 24, 1969, in the first floor auditorium of the County Office Building, 108 South Perry Street, Rockville, Maryland. The hearing was conducted pursuant to Sec. 77-5(3)(b) of the Ordinance.

The panel consisted of Gerald D. Morgan, Chairman and Presiding Officer, Dr. Thomas A. Cook, Jr., and Lawrence D. Burke, Commissioner. The case in support of the complaints was presented by Philip J. Tierney, Esq., Assistant County Attorney. Also participating were Stanley D. Abrams, Esq., Assistant County Attorney, and Samuel A. Chaitovitz, Esq., of the American Civil Liberties Union, representing Mr. and Mrs. Tillman.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the respondent was summoned to appear through four (4) representatives alleged in the complaint to have fostered the violation of the Ordinance. The four, Philip Trusso, Bernard Katz, Anthony J. DeSimone, and Brian Carroll, avoided the summons and did not appear. Counsel for respondent, William N. Dunphy, Esq., appeared and ad-

vised the Panel that his client did not choose to be present and challenged *inter alia* the jurisdiction of the Panel to conduct the hearing as respondent was alleged to be distinctly private in nature. Mr. Dunphy advised the Panel of equitable relief sought on behalf of respondent in the Circuit Court for Montgomery County and requested the hearing be suspended pending the outcome of his litigation. The Panel overruled respondent's motion. Mr. Dunphy then left and the Panel proceeded with the hearing.

As a result of all the evidence received at the public hearing, the Panel members make the following findings of fact, conclusion of law, decision, and final order.

FINDINGS OF FACT

1. The complainants, Mr. and Mrs. Murray Tillman, are taxpaying residents of the County and have been bona fide members of respondent since 1961.

2. The complainants, Dr. and Mrs. Press, have been taxpaying residents of the County since 1965. The Presses are Negroes. They live within the prescribed geographical boundaries, as contained in respondent's By-Laws, that would make them available for membership in respondent.

3. Respondent, Wheaton-Haven Recreation Association, Inc., is a non-profit Maryland corporation organized on May 23, 1958 for the purpose of operating a swimming pool for the recreation of the prescribed community. The respondent's business address is 10910 Horde Street, Silver Spring, Maryland, 20902.

4. Respondent pool was constructed in 1958-1959 subsequent to a special exception granted September 23, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(Z-4), Montgomery County Code (1955).

5. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28,

dated May 24, 1955. The Council stated therein that "... this action sets up the community swimming pools as a special exception. ... The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

6. On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, respondent application for the special exception. The record of these proceedings indicates that respondent's witnesses testified that the County was unsuccessfully approached to construct a pool, that in lieu of County action respondent initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

7. Prior to the grant of the special exception, the Board required respondent to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed. During early 1958, respondent conducted an intensive membership drive. A circular was published and distributed to surrounding neighborhoods and communities that requested an immediate and unqualified call for membership. Apparently no Negroes lived within the geographic area of the pool at the time. Door-to-door solicitations were conducted by respondent members to obtain membership and a minimum Twenty Dollar ($20.00) pledge. No qualifications were placed upon the respondent solicitors regarding membership criteria. On July 9, 1958 an open meeting was conducted by respondent's promoters on public grounds, the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, to further solicit and promote membership. These efforts resulted in meeting the zoning requisites.

8. During hearing before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859—Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. The pools were held to provide a healthy and constructive outlet for youth and general benefit to the public at large. The pools provide recreation to lower middle income groups that would otherwise be unavailable. The community pool was held distinguished from private country clubs and their attendant social program.

9. On June 12, 1962, the County Council adopted the Ordinance, Sec. 2 of which specifically provided that the definition of a public accommodation shall include swimming pools. At the time the Ordinance was enacted, there were no public, government-operated, swimming pools in existence within Montgomery County. There were, however, forty-three (43) community pools in operation in the County, including respondent.

10. Respondent is exempt from and does not pay federal or state income taxes under the provision of the U. S. Internal Revenue Code, Chapter 501, Sec. C(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Respondent also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted respondent because of its function as a community swimming facility.

11. Respondent operates exclusively as a community swimming facility conducting no social functions and its membership is solicited solely for that recreational purpose.

12. Before 1964 respondent did not conduct personal interviews with applicants. Recently respondent has insti-

tuted a policy of conducting personal interviews with applicants, but no social, formal or business background data is obtained from these interviews. The sole purpose of the interview is apparently to observe the physical appearance of the applicant.

13. Membership in respondent is not personal to the individual but runs to family units.

14. Respondent's By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership which is limited only to a prescribed geographic area and thirty (30) percent of the total membership may be excluded from that limitation.

15. By 1967 the neighborhood within the prescribed geographic area was a well-integrated community.

16. No Caucasian applicant has ever been rejected for membership in respondent.

17. Respondent, until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that respondent membership was open.

18. Until the summer of 1964, no racial discrimination policy was overtly manifested by respondent. That summer respondent refused to permit integrated swimming teams to utilize respondent facility. Some of respondent's members protested this policy and sought to change it. However, on November 11, 1964, at the annual open membership meeting of respondent, a proposal to change the swim team racial policy was rejected.

19. Subsequently, respondent refused to admit into the pool Negro babysitters who cared for children of members, while Caucasian babysitters of members were admitted.

20. On July 19, 1968, Mrs. Grace Rosner, a Negro, accompanied the Tillmans as their guest to respondent pool

and was admitted to the pool despite an altercation with Anthony J. DeSimone, who attempted to prohibit the admission of Mrs. Rosner. On July 24, 1968, Mrs. Rosner returned to the pool with the Tillmans, but was denied admission because of a newly promulgated rule that limited guests only to relatives of respondent members. This rule was not in existence prior to July 20, 1968. The rule was not enforced toward Caucasian guests. The respondent, through its gate attendants and officers, instructed members to lie about the relationship of their Caucasian guests, thereby avoiding the application of the rule.

21. In April, 1968, respondent, upon a good faith inquiry, failed to send a membership application to Dr. and Mrs. Press. The Presses have been and presently are willing to join respondent and are able to assume the financial responsibilities of membership. The Presses intended to use respondent pool as a convenient recreational facility that is available to their Caucasian neighbors and the Caucasian playmates of their children. In May, 1968, respondent officials expressly refused to consider the Presses for membership solely because of their race.

22. Brian Carroll, Anthony J. DeSimone, Bernard Katz, and Philip Trusso, officials of respondent, published and promoted on several occasions to witnesses appearing before the Panel that respondent pool was segregated and had a policy to continue such segregation.

23. On November 12, 1968, at a general membership meeting, the membership of respondent, by a vote of 81-25, endorsed the discriminatory policies practiced to that date.

Conclusions of Law

The core issue deals with whether the composition of people gathered at a swimming pool open to the neighborhood must include Negro friends and neighbors. If the complainants possess legally protected rights which respondent has abused, the respondent's conduct must

be circumscribed to comply with these rights. The respondent planned and built a swimming pool with its own funds to provide recreation for a prescribed community in Wheaton. Respondent contends the pool is private, that complainants have no rights concerning the pool, and it is free to pick and choose those who can swim. The view we take renders these contentions sophistic.

I.

A party claiming exemption from the Ordinance as an organization distinctly private in nature has the burden of demonstrating this assertion. Respondent's failure to appear and present evidence of a private nature does not help its case, but the purposes of our analysis we have attempted to view the facts in a light most favorable to respondent. The exemption to the Ordinance was designed to cover private organizations created to protect the personal associational preference of its members. However, a naked claim that an organization is private in nature will not stand if an examination reveals the organization lacks the characteristics usually attributed to such a private organization. We shall first examine respondent's qualification for this exemption.

The pool was built and operated solely as a community recreational facility and possesses none of the accoutrements of a private club, that is, rank, society, and selectivity. The pool has been accessible to the entire neighborhood Caucasian population without qualification. In fact, respondent's By-Laws allow thirty (30) percent of the membership to come from the *public at large*. The only concrete membership standard that has surfaced during respondent's existence is the ability to pay. The pool operates no social programs and the membership itself runs to the family unit rather than the individual. That respondent exercises no policy of genuine selectivity is manifested by the open invitation to neighborhood Caucasians with no evidence any of these applicants were ever rejected.

The recent employment of the interview device and a relatives-only guest rule supposedly throws a blanket of selectivity over respondent. However, the facts indicate these methods were merely a subterfuge, the objective of which was to test the color of the applicants' skin and exclude Negroes. Neither device has been applied consistently to Caucasians nor has respondent ever pursued a policy of exclusiveness toward Caucasians. By application of these afterthoughts, respondent attempts to take on a new appearance; we find he cannot use such methods to make a private club out of an organization with an alien nature.

But perhaps the most conclusive evidence of respondent's true nature can be found in the testimony submitted on its behalf before the zoning authority. That testimony gave no hint of a private nature or an interest by respondent in being so classified. Respondent's very existence and purpose was heralded as a public benefit—juvenile delinquency would be curtailed, restless youths would be given a playground, and an imperative community recreational need would be satisfied. To now contend that respondent is distinctly private in nature after the benefits of a favored status accorded by the government have been enjoyed since 1958 would cast considerable doubt on respondent's good faith and credibility. We therefore hold respondent has never been distinctly private in nature.

The factor which absolutely convinces us that respondent is a public accommodation is a reading of the Ordinance which expressly covers swimming pools. When the Ordinance was enacted by the County Council in 1962, forty-three community pools were in operation, including respondent. There were no government-operated pools in existence and community pools were the closest to the definition, "public." It would appear that the Council intended such swimming pools to be classified as a public accommodation since such was the holding by the Maryland Court of Appeals before enactment of the Ordinance.

Drews v. *State*, 224 Md. 186, 167 A.2d 341 (1960). If the Council intended to limit the definition of swimming pools to exclude the community pools, an exception could have easily been written into the Ordinance as was the case with taverns. Furthermore, the list of public accommodations could have excluded recreational areas as was the case with the State law. *Maryland Code*, Art. 49B, § 11, *et seq.* Therefore, it is only reasonable to infer from the ordinary meaning of the words used that the Ordinance was intended to cover community swimming pools, the only swimming pools in existence at the time. We hold that respondent is a public accommodation within the meaning of the Ordinance.

II.

Beyond the technical application of the Ordinance, serious questions concerning the substantive application of the Ordinance have been raised by respondent's particular conduct toward the complainants. The nature of respondent's operation, its government subsidies, open solicitation of Caucasian membership, and the public benefit aspects of its construction and operation give rise to a classification of respondent as a public function under the doctrine of *Evans* v. *Newton*, 382 U.S. 296 (1966). Therefore, respondent would be subject to the same limitation as the State.

The sale of real estate within the prescribed area contained in respondent's By-Laws is enhanced because of the proximity, accessibility, and advantages incident to a community swimming pool. This factor will allow Caucasians to sell to Caucasians at a premium. Negroes must pay the premium without receiving the corresponding benefits or forego purchase of a house in the prescribed area. The result of this policy deprives the Negro of basic legal rights.

Some pool members are forced, through the inconsistent application of the relatives-only guest policy to limit their

social experiences or forego use of the pool. The result of such an arbitrary standard is to circumscribe and discourage the free associational conduct of these members and also deprives them of basic legal rights.

The full thrust of respondent's policy would tend to discourage Negroes from moving into the prescribed area. In effect, respondent, through its policy of systematic discrimination, has created a racial zoning ordinance without County sanction. These are areas that the public accommodations ordinance is certainly intended to protect and respondent, as public function, may not operate to derogate this intent. It is therefore unlawful for any place of public accommodation in the County to practice racial discrimination in granting membership or admitting guests when guests are so provided by the organization's own regulations. However, in the instant case, it has been demonstrated that respondent received and continues to receive special treatment by the government in the form of tax exemptions, liberal zoning laws, and various other consideration during the initial building stage. These factors tend to impose an even higher standard of duty upon respondent to refrain from practicing racial discrimination.

III.

The several incidents of alleged racial discrimination are well supported and uncontroverted. A Negro was excluded from the pool as a guest of a bona fide member on the basis of lack of relationship to member. However, Caucasians were admitted with the same lack of membership and told to lie about it. It is clear the family relationship rule and its application was a mere contrivance to exclude Negroes from an otherwise open facility. Such practices are unlawful.

A Negro family applied for pool membership while filling all of the apparent requisites set for Caucasian applicants. Their unexplained exclusion was clearly discriminatory and unlawful.

Several respondent officials published and promoted the racial discrimination policy stated above, also in violation of the Ordinance. It is clear from a total view of respondent's conduct over the years that it has practiced an unlawful and systematic policy of racial discrimination. The respondent was clearly an open facility regarding Caucasian guests and residents. The only restrictions were applied toward the Negro guest and resident.

PANEL'S DECISION

And now, May 29, 1969, upon consideration of all the evidence submitted at the public hearing of this case, the finding of fact, and the conclusion of law, the Montgomery County Human Relations Commission Public Accommodation Panel unanimously finds and determines:

1. The Panel has jurisdiction over respondent, over the subject matter of this proceeding, and over the instant complaint.

2. The respondent, Wheaton-Haven Recreation Association, Inc., is a public accommodation as that term is defined in the Ordinance, Sec. 77-9.

3. The respondent has refused, withheld from, and denied to the complainants, solely because of race, the accommodations and advantages of the respondent's community swimming pool, either as members or guests, and consequently respondent has committed and continues unlawful discriminatory practice in violation of the Ordinance, Sec. 77-10.

4. Respondent, operating as a public function and under the Ordinance, cannot promote policies of racial discrimination excluding Negroes to the extent its facilities are available and open to Caucasians.

FINAL ORDER

And now, May 29, 1969, upon consideration of the foregoing, and pursuant to Sec. 77-5 of the Ordinance, it is hereby ORDERED:

1. That the respondent, Wheaton-Haven Recreation Association, Inc., its agents, employees and members, shall cease and desist from directly or indirectly refusing, withholding from, or denying to complainants and other persons, because of their race, color, religion, creed, ancestry or national origin, the accommodations and advantages of membership and guest privileges in the respondent community swimming pool facility or the use and enjoyment thereof.

2. That the respondent, Wheaton-Haven Recreation Association, Inc., shall take the following affirmative action which in the judgment of the Panel will effectuate the purposes of the Ordinance.

a. Instruct all its members, officers, managers, and employees, in writing, to comply with the requirements of Paragraph 1 of this Final Order. Copies of such written instruction, signed by all of respondent's officers, managers, and employees, acknowledging receipt and understanding thereof shall be transmitted to the Panel within fifteen (15) days after service of this Final Order.

b. Notify all members of respondent, in writing, that henceforth the policy and practice of respondent will be to serve any guest of a member regardless of his race, religion or national origin and that new members will be considered without regard to race, religion or national origin. A copy of such written communication shall likewise be transmitted to the Panel.

3. Failure to comply with this Order within the specified time will subject the respondent and its officers, jointly and severally, to the liabilities imposed by the Ordinance. This in no way limits the Panel or the Human Relations

Commission from pursuing any of the rights and remedies provided by law.

By Order of

The Montgomery County, Maryland, Human Relations Commission Panel on Public Accommodations

Gerald D. Morgan, *Chairman*
Dr. Thomas A. Cook, Jr.
Lawrence D. Burke